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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOHN JOSEPH BRENNAN, Defendant and Appellant.	A147061 (Solano County Super. Ct. No. FCR315212)

John Joseph Brennan was placed on probation after a jury convicted him of felony possession of methamphetamine for sale and misdemeanor possession of a smoking device for controlled substances. (Health & Saf. Code, §§ 11378, 11364.1, subd. (a).) In this appeal, he contends the trial court erroneously denied his motion to suppress evidence discovered during the search of his illegal campsite. (Pen. Code, § 1538.5.) We affirm.

I. BACKGROUND[1]

On June 15, 2015, at 9:14 p.m., Officer Brian Collins of the Vacaville Police Department was on patrol with his field training officer, who had seen what he believed to be an illegal encampment earlier in the day. They stopped to investigate the encampment, which was located on open space within the city near an onramp to eastbound Interstate 80. Collins parked the patrol car on the curb line and they

[1] Because the sole issue on appeal is the denial of appellant's motion to suppress, our rendition of the facts is taken from the evidence presented at the suppression hearing rather than the evidence presented during the trial on the charges.

approached the campsite from the street. They walked down a small embankment and saw a tarp held up by two poles. Collins shined his flashlight and saw two men kneeling inside the makeshift tent, one of whom was appellant. There was a backpack at appellant's knees and a purple suitcase to his right and appellant was "moving around" between the two.

Officer Collins saw several tools and sharp objects that could be used as weapons, so he directed appellant and the other man to leave the makeshift tent and sit down at a location about 10 feet away. Collins looked around the campsite, using his flashlight to illuminate the open area, and saw a white bucket with two glass pipes with bulbous ends of a type that were typically used to smoke methamphetamine. He also saw a digital scale and a rolled-up dollar bill inside the tent. Collins noticed a knife sticking out of appellant's pocket. He placed appellant under arrest for illegal camping within city limits. (Vacaville Mun. Code, § 12.32.030.)[2]

After arresting appellant, Officer Collins searched the backpack that had been next to appellant when he was still inside the makeshift tent. Inside the backpack he found a small baggie containing a white crystalline substance and a hypodermic needle. A K-9 was used to search the rest of the camp and the K-9 officer told Collins to search the suitcase. Inside the suitcase was a larger bindle of suspected methamphetamine and a small amount of methamphetamine in an Altoids container inside a plastic bag.

Based on Officer Collins's testimony, the prosecution urged the court to uphold the search of the suitcase and backpack as incident to a lawful arrest. Counsel for appellant responded that the searches were illegal because they occurred when appellant was unlawfully detained. He submitted the campsite was not illegal because camping

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[2] As relevant here, Vacaville Municipal Code section 12.32.030 provides, "It is unlawful and a public nuisance for any person or group of persons to camp, occupy camping facilities, or use camping paraphernalia in the following areas: [¶] A. Any public property, improved or unimproved, including, but not limited to, public streets and sidewalks, parks, open space, and other property. . . ." A violation of this provision is a misdemeanor. (Vacaville Mun. Code, § 1.16.010, subd. (A).)

was defined by the Vacaville Municipal Code as sleeping at any time between the hours of 11:00 p.m. and 8:30 a.m., and it was only 9:14 p.m. when appellant was contacted. (See Vacaville Mun. Code, § 12.32.020, subd. (A)(1)–(2).) The prosecution noted that illegal camping was also defined as having a tent on public open space at any time of the day or night. (Vacaville Mun. Code, § 12.32.020, subd. (A)(3).)[3]

The trial court denied the motion: "[T]he defendant clearly camped in a prohibited area. The officer's conduct was reasonable under the circumstances. The area around the tent was not within a defined residential curtilage in which defendant had a reasonable expectation of privacy. He had no legitimate expectation of privacy in that location. The defendant was a trespasser on land subject to immediate objection by authorities whether the occupancy and construction were in bad faith and the legal right to occupy the land or put up a structure on it were factors highly relevant to the issue of an expectation of privacy. The area searched is subject to the protection of the Fourth Amendment. Under the circumstances of this case, observations and seizure and the arrest was lawful, the subsequent search was lawful. The motion is denied."

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[3] The prosecutor was correct, assuming the violator had the intent of spending the night. Vacaville Municipal Code section 12.32.020, subdivision (A), provides: " 'Camp,' 'camping,' or 'occupy camping facilities' means to do any of the following: [¶] 1. To sleep at any time between the hours of 11:00 p.m. and 8:30 a.m. in any of the following places: [¶] a. Outdoors, with or without bedding, sleeping bag, blanket, mattress, tent, hammock, camping facility, or other similar protection, equipment or device; [¶] b. In, on, or under any structure or thing not intended for human occupancy, whether with or without bedding, sleeping bag, blanket, mattress, tent, hammock, camping facility, or other similar protection, equipment or device. [¶] 2. To establish or maintain, outdoors or in, on, or under any structure, object or thing not intended for human occupancy, at any time between the hours of 11:00 p.m. and 8:30 a.m., a temporary or permanent place for sleeping by setting up any bedding, sleeping bag, blanket, mattress, tent, hammock, camping facility, or other sleeping equipment or device in such a manner as to be usable for sleeping purposes. [¶] *3. To establish or maintain, outdoors or in, on, or under any structure or thing not intended for human occupancy, at any time during the day or night, a temporary or permanent place for cooking or sleeping by setting up any bedding, sleeping bag, blanket, mattress, tent, hammock, camping facility, or other sleeping equipment or device or by setting up any cooking equipment, with the intent to remain in that location overnight.*" (Italics added.)

II. DISCUSSION

"A search conducted without a warrant is unreasonable per se under the Fourth Amendment unless it falls within one of the 'specifically established and well-delineated exceptions.' " (*People v. Woods* (1999) 21 Cal.4th 668, 674.) One such exception is a search incident to a lawful arrest, which allows a police officer to " 'conduct a contemporaneous warrantless search of the arrestee's person and of the area into which the arrestee might reach to retrieve a weapon or destroy evidence.' " (*People v. Ingham* (1992) 5 Cal.App.4th 326, 330–331; see *Arizona v. Gant* (2009) 556 U.S. 332, 338–339 (*Gant*); *Chimel v. California* (1960) 395 U.S. 752, 755–762; *People v. Leal* (2009) 178 Cal.App.4th 1051, 1059–1063.) The prosecution has the burden of proving by a preponderance of the evidence that a warrantless search was justified. (*People v. Redd* (2010) 48 Cal.4th 691, 719; *People v. Torres* (1992) 6 Cal.App.4th 1324, 1334.)

The trial court upheld the warrantless search of the suitcase and backpack as incident to a lawful arrest. Appellant does not challenge the validity of the underlying arrest for unlawful camping as he did below, but argues for the first time on appeal that the search exceeded the permissible scope of a search incident to arrest because the items searched were no longer within his immediate control. We agree with the People that appellant has forfeited this argument by failing to raise it in the trial court.

"[W]hen defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant. The prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification. [Citation.] Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal. '[T]he scope of issues upon review must be limited to those raised during argument . . . .This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions.' [Citation.]" (*People v. Williams* (1999) 20 Cal.4th 119, 136 (*Williams*).)

In his written motion to suppress, appellant alleged the police had acted without a warrant and detained him unlawfully, making the drug-related items found at the campsite the fruit of an unlawful detention. He gave no specifics as to why the detention was unlawful. The prosecution filed written opposition arguing Officer Collins (1) was entitled to briefly detain appellant to determine whether he was unlawfully camping in violation the Vacaville Municipal Code, (2) had probable cause to arrest appellant once he viewed the glass pipes in plain view, and (3) was entitled to search the backpack and suitcase incident to appellant's arrest as containers within his immediate control.

After hearing Officer Collins's testimony at the suppression hearing, defense counsel maintained that appellant's detention and arrest for unlawful camping was unsupported by adequate cause because that offense can only be committed by sleeping on public property or open space between 11:00 p.m., and 8:30 a.m., and appellant was contacted at 9:14 p.m. (See Vacaville Mun. Code, § 12.32.020, subd. (A)(1).) The prosecution cited Vacaville Municipal Code section 12.32.020, which makes it a misdemeanor to erect a tent on public open space at any time when there is an intent to spend the night, and noted the officers also had probable cause to arrest appellant for the narcotics paraphernalia in plain view. Defense counsel did not address whether the search of the suitcase and backpack exceeded the permissible scope of a search incident to arrest in the event the court concluded the arrest was lawful.

Appellant now argues that Officer Collins exceeded the permissible scope of a search incident to arrest because appellant was outside the tent, at least 10 feet away from those containers, when he was arrested. But this was not the basis for his suppression motion in the trial court, where he focused exclusively on the legality of the initial detention and arrest. "[O]nce the prosecution has offered a justification for a warrantless search or seizure, defendants must present any arguments as to why that justification is inadequate. [Citation.] Otherwise, defendants would not meet their burden under [Penal Code] section 1538.5 of specifying why the search or seizure without a warrant was 'unreasonable.' This specificity requirement does not place the burden of proof on defendants. [Citation.] As noted, the burden of raising an issue is distinct from the

burden of proof. The prosecution retains the burden of proving that the warrantless search or seizure was reasonable under the circumstances. [Citation.] But, if defendants detect a critical gap in the prosecution's proof or a flaw in its legal analysis, they must object on that basis to admission of the evidence or risk forfeiting the issue on appeal." (*Williams, supra,* 20 Cal.4th at p. 130.)

Appellant urges us to follow *People v. Smith* (2002) 95 Cal.App.4th 283, 300, in which the defendant successfully challenged an alleged inventory search on the ground the prosecution had not presented evidence of a standardized policy regarding such searches. Although the defendant had not raised this specific challenge in his reply papers in the trial court, the existence of such a policy was an element of a valid inventory search and the prosecution and court were on notice of the issue by virtue of the justification offered. (*Id*. at pp. 294–300.) Here, by contrast, the prosecution carried its burden of establishing a lawful arrest and a contemporaneous search. In the absence of any challenge to the scope of that search, the prosecution and court were not placed on notice of the challenge now raised.

The situation before us is more akin to that in *People v. Oldham* (2000) 81 Cal.App.4th 1, 11–14, in which the defendant had argued in the trial court that his father lacked the authority to consent to a search of a bedroom in a shared apartment. The defendant was deemed to have forfeited an appellate argument that the scope of the father's consent did not extend to closed containers inside the bedroom. (*Ibid*.) "Because the prosecution did not have fair notice of such issue below or the opportunity to present responsive evidence to such challenge, leaving the matter unaddressed and unanalyzed, [defendant] cannot now raise it." (*Id.* at p. 15; see also *People v. Lewis* (1999) 74 Cal.App.4th 662, 673 [challenge to warrantless home arrest did not preserve issue regarding knock-notice requirement].)

Appellant's failure to challenge the scope of the search similarly deprived the prosecution of fair notice and the opportunity to present a response. The existence of the search incident to arrest exception is well established, but the proper scope of such a search is not always clear, particularly when the defendant has been taken into custody

and the search involves a closed container not on the defendant's person. (See *Leal, supra,* 178 Cal.App.4th pp. 1059–1063.) Moreover, while a search incident to arrest outside the automobile context is limited to the arrestee's person and the area within his immediate control, i.e., " 'the area from within which he might gain possession of a weapon or destructible evidence' " (*Gant, supra,* 556 U.S. at p. 339), "[a] different rule of reasonableness applies when the police have a degree of control over a suspect but do not have control of an entire situation. In such circumstances—e.g., in which third parties known to be nearby are unaccounted for, or in which a suspect has not yet been fully secured and retains a degree of ability to overpower the police or destroy evidence—the Fourth Amendment does not bar the police from searching the immediate area of the suspect's arrest as a search incident to arrest." (*Leal*, at p. 1060; see *People v. Summers* (1999) 73 Cal.App.4th 288, 289–291.)

Had the prosecution understood appellant to be challenging the scope of the search incident to arrest in addition to the probable cause supporting the arrest, it might have presented additional evidence concerning the degree to which appellant had been secured and the status of the other individual present at the scene. Additionally, had the prosecution known appellant was challenging the scope of the search incident to arrest, it might have presented evidence in support of its claim on appeal that the suitcase and backpack would have been transported with appellant and examined during an inventory search when he was booked into custody, making the discovery of their contents inevitable. (See *People v. Evans* (2011) 200 Cal.App.4th 735, 756; *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1021–1023.)

Appellant's argument that the police lacked adequate cause to detain or arrest him did not provide the prosecution with reasonable notice that it needed to demonstrate the scope of the search was reasonable assuming the arrest itself was supported by probable cause. The issue now raised by appellant has been forfeited.

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A147061)